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2005 MAY 17 A 9 07

FIRST GENERAL COUNSEL'S REPORT

**SENSITIVE**

MURs: 5540 and 5545

**MUR 5540**

**COMPLAINANT:** Center for Individual Freedom

**RESPONDENTS:** CBS Broadcasting, Inc.  
Kerry-Edwards 2004, Inc., and Robert Farmer, in his official capacity as  
Treasurer

DATE COMPLAINT FILED: 09/23/04

DATE OF NOTIFICATION: 09/30/04

DATE ACTIVATED: 02/09/05

STATUTE OF LIMITATIONS: September 8, 2009

**MUR 5545**

**COMPLAINANT:** Jeffrey S. Smith

**RESPONDENTS:** Dan Rather, CBS News  
CBS  
Viacom, Inc.

DATE COMPLAINT FILED: 09/27/04

DATE OF NOTIFICATION: 10/05/04

DATE ACTIVATED: 02/09/05

STATUTE OF LIMITATIONS: September 8, 2009

**RELEVANT STATUTES:** 2 U.S.C. § 431(9)(B)(i)  
2 U.S.C. § 434(f)  
2 U.S.C. § 441b(a)  
2 U.S.C. § 441b(c)

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11 C.F.R. § 100.73

11 C.F.R. § 109.21(b)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

**I. INTRODUCTION**

The complaints in MURs 5540 and 5545 involve the September 8, 2004, CBS broadcast of a *60 Minutes Wednesday* news story ("the Broadcast") about President Bush's Texas Air National Guard service. Dan Rather anchored the piece, which relied in part upon documents that CBS later admitted could not be authenticated. Those documents appeared to prove that President Bush received preferential treatment in connection with his service in the Guard, including overlooking his failure to fulfill orders.

The complaint in MUR 5540 alleges that (1) the news story constituted a prohibited electioneering communication under 2 U.S.C. § 434(f); (2) the electioneering communication was coordinated with the Kerry-Edwards 2004, Inc., campaign and, therefore, constituted a prohibited corporate contribution under 2 U.S.C. §§ 441b(a) and (c); and (3) the electioneering communication should have been reported by CBS as a contribution and by the campaign as an expenditure under 2 U.S.C. § 434(f). The complaint in MUR 5545 alleges that the Broadcast constituted an independent expenditure and a prohibited corporate contribution.

Both complaints allege that the story is not entitled to the Commission's media exemption: MUR 5540 asserts that the Broadcast was not a legitimate news story because CBS failed to thoroughly verify its news sources and improperly coordinated with the Kerry campaign, and MUR 5545 asserts that the Broadcast does not fit the definition of a news story, commentary or editorial under 11 C.F.R. § 100.73 because it expressly advocated the

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1 defeat of President Bush. Respondents counter that the media exemption applies and  
2 prohibits the Commission from analyzing the complaints.

3 Because we conclude that the media exemption applies, this Office recommends that  
4 the Commission find no reason to believe that Respondents violated the Federal Election  
5 Campaign Act of 1971, as amended, ("the Act") in connection with the Broadcast.

6 **II. FACTUAL SUMMARY**

7 CBS Broadcasting, Inc. ("CBS") is a New York corporation and a subsidiary of  
8 Viacom, Inc. CBS owns and operates the CBS broadcast television network, including its  
9 news division. *See* MUR 5540 Complaint, at 2. *60 Minutes Wednesday* ("*60 Minutes*") is a  
10 weekly news magazine program in the CBS news division and has been aired since 1998.  
11 *See* CBS Response, at 1. The hour-long program consists of various segments, including  
12 investigative reports, interviews, features and profiles. *Id.*

13 On September 8, 2004, *60 Minutes* aired a story about purported special treatment  
14 President Bush received during the Vietnam War. Although the same allegations had been  
15 made before, the Broadcast purported to offer "new" documents that allegedly proved the  
16 allegations. *See* MUR 5540 Complaint, Attachment 1 (Broadcast Transcript). The  
17 documents appeared to be memoranda written by President Bush's supervisor in the Texas  
18 Air National Guard that revealed that then-Lieutenant Bush asked to be excused from duty  
19 requirements and a scheduled physical examination to work on a political campaign in  
20 Alabama. *See id.* According to the documents, despite not receiving permission to be  
21 excused, President Bush did not appear for the physical and was subsequently suspended  
22 from flying status. *See id.* The documents also suggested that President Bush received an  
23 honorable discharge upon leaving the Guard due to preferential treatment he received as the  
24 son of then-Congressman George H.W. Bush. *See id.*

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1 Immediately after airing the story, questions arose on the Internet and in the media as  
2 to the documents' authenticity. *See* CBS Special Report, at 20. At first, CBS defended the  
3 Broadcast, but on September 20, 2004, Dan Rather apologized on behalf of CBS and himself  
4 on-air for not being able to verify the authenticity of the documents and relying on a source  
5 who subsequently admitted providing false information to the network. *See* MUR 5540  
6 Complaint, Attachment 5 (CBS News, Sept. 20, 2004, Transcript). CBS also announced that  
7 it was commissioning an independent investigation into the Broadcast and would make the  
8 results public. (The investigation resulted in a report issued on January 10, 2005 ("Special  
9 Report")).<sup>2</sup>

10 Soon after the CBS apology, information emerged that CBS and the Kerry-Edwards  
11 Campaign ("Campaign") had been in contact a few days before the Broadcast aired. *See*  
12 Special Report, at 208, 211. According to the Special Report, a few days before the  
13 Broadcast aired, the Broadcast's producer, Mary Mapes, asked Joe Lockhart, a senior advisor  
14 to the Campaign, to speak with Bill Burkett, the source of the National Guard documents.  
15 *See id.*, at 26-27, 209. Apparently, Burkett said he would be more forthcoming with  
16 documents if he were allowed to communicate with the Kerry campaign. *See id.* at 27. A  
17 couple of days later, Lockhart called Burkett. *See id.* According to Lockhart, Burkett gave  
18 advice on how to run the Campaign, and they did not talk about any documents. *See id.*  
19 Complainants in MUR 5540 allege that the contact between Mapes and Lockhart constituted  
20 coordination resulting in a prohibited corporate contribution from CBS to the Campaign.  
21

<sup>2</sup> The Special Report is available at [http://www.image.cbsnews.com/htdocs/pdf/complete\\_report/CBS\\_Report.pdf](http://www.image.cbsnews.com/htdocs/pdf/complete_report/CBS_Report.pdf).

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1       **III.    LEGAL ANALYSIS**

2               The Act prohibits corporations from making contributions or expenditures from their  
3       general treasury funds in connection with any election of any candidate for federal office. 2  
4       U.S.C. § 441b(a). Notwithstanding this prohibition, the Act's media exemption excludes  
5       from the definitions of contribution and expenditure, in relevant part, "any cost incurred in  
6       covering or carrying a news story, commentary, or editorial by any broadcasting station ...  
7       unless the facility is owned or controlled by any political party, political committee, or  
8       candidate." 11 C.F.R. §§ 100.73 and 100.132. Additionally, any communication "appearing  
9       in a news story, commentary, or editorial distributed through the facilities of any broadcast  
10      station" is excluded from the definition of "electioneering communication." 2 U.S.C. §  
11      434(f)(3)(B); *see also* 11 C.F.R. § 100.29(c)(2).

12              It is undisputed that CBS is a broadcast station, not owned by a political party,  
13      committee or candidate. CBS is in the regular business of disseminating news stories,  
14      commentary, and editorials to the public, and *60 Minutes* is one of its regularly scheduled  
15      programs in the news division. Further, the Broadcast appeared on a regularly scheduled *60*  
16      *Minutes* program.

17              Although CBS has admitted that much of the Broadcast "was wrong, incomplete or  
18      unfair,"<sup>3</sup> the Broadcast falls squarely within the legitimate press function of CBS. The media  
19      exemption does not require a finding that the news story was accurate or well researched, as  
20      the complainant in MUR 5540 suggests. Even seemingly biased stories or commentary by a  
21      press entity can fall within the media exemption. *See, e.g.,* MUR 3624 (Walter H. Shapiro)  
22      (Commission found that pro-Bush/Quayle broadcast by Rush Limbaugh fell within media

<sup>3</sup> *See* Statement of CBS's CEO and Chairman Leslie Moonves, January 10, 2005, available at  
[http://www.image.cbsnews.com/htdocs/pdf/complete\\_report/cbs\\_response.pdf](http://www.image.cbsnews.com/htdocs/pdf/complete_report/cbs_response.pdf).

1 exemption); *see also* MUR 4946 (CBS, Statement of Reasons, Wold and Mason).  
2 Significantly here, the Broadcast appears to have been similar in form and distributed in the  
3 same manner as other *60 Minutes* news stories, and no information has been presented to the  
4 contrary. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986).  
5 Therefore, for this reason and the reasons previously stated, it appears that the Broadcast was  
6 within the legitimate press function of CBS.

7 With respect to the coordination allegation, there is no information suggesting that the  
8 contact between CBS and the Campaign, or the source and the Campaign, may have met one  
9 or more of the conduct standards set forth in 11 C.F.R. § 109.21(d). In fact, available  
10 information suggests that CBS contacted the Campaign for the sole reason that its source  
11 insisted upon having an opportunity to speak to the campaign and that nothing discussed  
12 between CBS and the Campaign, or the source and the Campaign, played any part in the  
13 creation, production or distribution of the Broadcast. Nevertheless, even if the contact did  
14 rise to a level meeting one or more of the conduct standards, the coordination regulations  
15 exclude news stories falling with the media exemption. *See* 11 C.F.R. § 109.21(b)(1).

16 Accordingly, this Office recommends that the Commission find no reason to believe  
17 that the Respondents in MURs 5540 and 5545 violated the Act in connection with the  
18 Broadcast.

19 **IV. RECOMMENDATIONS**

- 20 1. In MUR In MUR 5540, find no reason to believe that CBS Broadcasting, Inc.,  
21 Kerry-Edwards 2004, Inc., and Robert Farmer, in his official capacity as  
22 Treasurer, violated the Act in connection with the September 8, 2004 broadcast of  
23 *60 Minutes Wednesday*.  
24  
25 2. In MUR 5545, find no reason to believe that Dan Rather, CBS News, CBS or  
26 Viacom, Inc., violated the Act in connection with the September 8, 2004  
27 broadcast of *60 Minutes Wednesday*.  
28

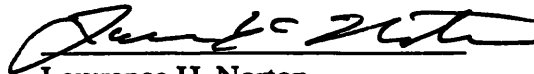
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3. Approve the appropriate letters.

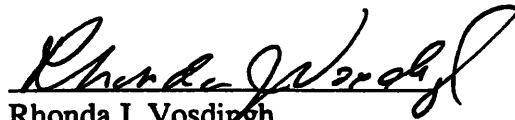
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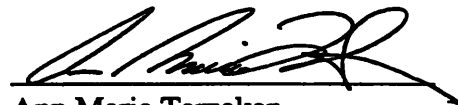
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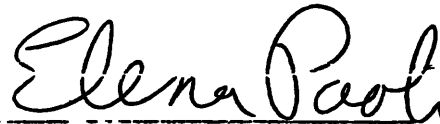
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